It goes without saying that it is a question for the court to find on any document, or evidence whether it is the performance of the substituted obligation that is intended by the parties as such satisfaction, or on the other hand, just a mere promise to perform it as so intended by the parties.

Looking at the family agreement and the tripartite agreement, I had no doubt that the caveator had accepted a promise to have the sum of $250,000 paid to him instead of the actual payment. I was fortified in my view, in particular by the facts of actual withdrawal of the previous caveat before the caveator had received even one cent, secondly, of the filing of the civil suit for the recovery of $250,000 before the present summons was filed.

Before the family agreement and tripartite agreement were signed, there was no doubt that the caveator had a valid claim to be beneficially entitled under a trust affecting the said lands. To be more specific, the executor would at any rate assume the additional capacity of a trustee when he had fully administered the estate of the deceased and held the residue. The caveator had as against the said lands, therefore a caveatable interest under s 323 of the National Land Code in respect of the said lands that formed part of the estate of the deceased. Under the family agreement and the tripartite agreement, the said lands were to be transferred to the company which would issue the shares mentioned earlier and pay also the sum of $250,000.

The original obligation in this case, with regard to the principle of accord and satisfaction, was the obligation of the trustee, in respect of the said lands, to distribute the residue, or rather one-third of it to the caveator.

The substituted obligation was the issue of shares and the payment of $250,000.

It would make no difference that the substituted obligation was to be performed by the company, and not by the executor for satisfaction could come from a third party. Thus in *Hirachand Punamchand* v *Temple*,[3] a father sent to his son's creditor a bank draft, in fact for a sum less than the debt. It was cashed by the creditor. It was held that the creditor could not maintain an action for the balance as it would be a fraud to do so. It was implicit in that judgment that such satisfaction could come from a third party. It, of course, happens all the time that an insurance company pays the sum agreed by both plaintiff and defendant in any running-down case.

Since the family agreement and tripartite agreement were signed, and on their true construction, the caveator had agreed to accept the promise of payment of $250,000 there was an accord and satisfaction, whereby the executor's old obligation was substituted with the new. A new cause of action was created in regard to the sum of $250,000 which irreversibly he had to accept. Such accord and satisfaction would therefore bar any claim of the caveator to the said lands as a beneficiary other than the sum of $250,000.

If this remedy now was merely to claim $250,000, this claim could not amount to any caveatable interest as defined in the National Land Code. The substratum which used to support the previous caveat had disappeared forever.

Should it be said elsewhere that the issue of accord and satisfaction was never pleaded, I would revert to the submission of counsel for the executor set out earlier, which though slightly peripheral and not pronouncedly direct, was, in my view broad enough to attract the operation of the principle as explained in the *British Russian Gazette* case.[2]

I therefore ordered the removal of the caveat to allow the transfer of the said lands asked for in the summons. I further ordered that costs payable to the successful parties (the applicants and the second respondent) be paid out of the fund of the estate of the said deceased. There was no other order as to costs.

Application allowed.

Solicitors: *RJ Esa & Co*; *LH Singh & Co*; *Mogan & Co.*

Reported by *Ng Sheau Jiuan*

Lim Eng Yew v United Oriental Assurance Sdn Bhd

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO P395 OF 1980
AJAIB SINGH J
13 JANUARY 1989

Road Traffic – Motor insurance – Policy covered vehicle owner and authorized driver – Plaintiff in the employ of vehicle owner – Plaintiff injured while travelling as passenger in vehicle owner's lorry – Authorized driver sued – Whether defendant insurance company liable to pay damages – Road Traffic Ordinance 1958, s 80(1)

Insurance – Motor insurance – Policy covered vehicle owner and authorized driver – Plaintiff in the employ of vehicle owner – Plaintiff injured while travelling as passenger in vehicle owner's lorry – Authorized driver sued – Whether defendant insurance company liable to pay damages – Road Traffic Ordinance 1958, s 80(1)

The plaintiff sued the defendants pursuant to s 80(1) of the Road Traffic Ordinance 1958 as a result of injuries suffered in a motor accident caused by the negligence of the driver of the motor lorry in which he was travelling. At the time of the

accident, the plaintiff was being carried as a passenger in the motor lorry pursuant to an employment contract between him and the vehicle owner.

The insurance policy covering the lorry, issued by the defendants to the vehicle owner, indemnified the vehicle owner against all sums which the vehicle owner or any authorized driver might be liable to pay as damages or compensation in respect of death of or bodily injury to any person caused by or arising out of the use of the vehicle, including costs. The plaintiff had sued L, the authorized driver of the vehicle at the time of the accident, and had obtained judgment for damages.

In their defence, the defendants relied on exception (ii) of the exceptions to section II in the policy which stated that the company shall not be liable in respect of death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment.

Held, allowing the plaintiff's claim:

(1) Under section II of the policy, an authorized driver would be indemnified by the insurers as though he was the insured. This means that L, the authorized driver in this case, was separately covered under the terms of the policy. However, the plaintiff was not a person in the employment of L as envisaged under exception (ii) in the exceptions to section II.

(2) Exception (iii) in the exceptions to section II stated that the company shall not be liable in respect of death of or bodily injury to any person other than a passenger carried by reason of or in pursuance of a contract of employment. This exception made the defendants liable because the plaintiff was a passenger carried by reason of and in pursuance of a contract of employment.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 315 of 1988.]

Cases referred to

1 *Chan Kum Fook & Ors* v *The Welfare Insurance Co Ltd* [1975] 2 MLJ 184 (refd)
2 *China Insurance Co Ltd* v *Teh Lain Lee* [1977] 1 MLJ 1 (refd)
3 *Richards* v *Cox* [1942] 2 All ER 624 (refd)

Legislation referred to

Road Traffic Ordinance 1958 s 80(1)

Wong Soon Foh for the plaintiff .
S Radhakrishnan for the defendants.

Cur Adv Vult

Ajaib Singh J: The plaintiff in this case sued the defendants pursuant to s 80(1) of the Road Traffic Ordinance 1958. On 26 June 1972 the plaintiff suffered injuries arising out of a motor accident caused by the negligence of the driver of motor lorry no AL1577. At the time of the accident the plaintiff was being carried as a passenger in the motor lorry pursuant to a contract of employment between him and the owner of the vehicle, one Lim Yoke Pak.

The defendants had issued a commercial vehicle insurance policy effective from 1 May 1972 to 30 April 1973 to Lim Yoke Pak whereby the defendants agreed to indemnify the said Lim Yoke Pak against all sums which the said Lim Yoke Pak or any authorized driver might be liable to pay as damages or compensation in respect of death of or bodily injury to any person caused by or arising out of the use of the vehicle including costs.

On 7 June 1977, the plaintiff sued Lim See Keong the authorized driver of the vehicle at the time of the accident. On 15 June 1978, the plaintiff obtained judgment for damages arising out of the motor accident against Lim See Keong in the sum of $120,000 being general and special damages with interest and costs. Costs were subsequently agreed at $3,000 in lieu of taxation.

In their amended defence the defendants admit that at the relevant time the policy was in force but deny that the plaintiff was being carried as a passenger in pursuance of a contract of employment. The defendants further aver that in the event the plaintiff was a passenger, which was denied, the defendants would rely on exception (ii) of the exceptions to section II in the policy which states as follows:

> The company shall not be liable in respect of death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment.

Further and in the alternative the defendants aver that the plaintiff did not comply with s 80(2) of the Road Traffic Ordinance in that he failed to give notice to them within the time stipulated. In the circumstances the defendants aver that they are not liable to pay any sum to the plaintiff.

In the course of the trial the defendants did not pursue their averment that the plaintiff was not being carried as a passenger in the motor lorry in pursuance of a contract of employment. In fact to take advantage of exception (ii) in the exceptions to section II the defendants relied strongly on the fact that the plaintiff was such a passenger. The defendants did not also pursue their allegation that the plaintiff had failed to comply with s 80(2) of the Road Traffic Ordinance.

I am of the view that the plaintiff must succeed in this case. In section II, 'Liability to Third Party', it is provided, inter alia, that:

> (1) The company will, subject to the limits of liability, indemnify the insured in the event of accident caused by or arising out of the use of the motor vehicle or in connection with the loading or unloading of the motor vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of:
> (a) death or bodily injury to any person;
> (b) damage to property.
>
> (2) In terms of and subject to the limitations of and for the purposes of this section the company will indemnify any

authorized driver who is driving the motor vehicle provided that such authorized driver:
(a) shall as though he were the insured observe fulfil and be subject to the terms of the policy in so far as they can apply;
(b) is not entitled to indemnity under any other policy.

Under the exceptions to section II it is provided, inter alia, that:

The company shall not be liable in respect of:

(i) death, bodily injury or damage caused or arising beyond the limits of any carriageway or thoroughfare in connection with the bringing of the load to the motor vehicle for loading thereon or the taking away of the load from the motor vehicle after unloading therefrom;
(ii) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment;
(iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or emerging or getting onto or alighting from the motor vehicle at the time of occurrence of the event out of which any claim arises.

It will be seen from the above provisions in the policy that under para 2 of section II, 'Liability to Third Party', an authorized driver would be indemnified by the insurers as though he was the insured. This means that Lim Swee Keong, the authorized driver in this case, was separately covered under the terms of the policy, and the plaintiff was certainly not a person in the employment of Lim Swee Keong as envisaged under exception (ii) in the exceptions to section II.

Secondly, exception (iii) in the exceptions to section II made the defendants liable because the plaintiff was 'a passenger carried by reason of or in pursuance of a contract of employment'.

In support of my conclusions above, the Singapore cases of *Chan Kum Fook & Ors* v *The Welfare Insurance Co Ltd*[1] and *China Insurance Co Ltd* v *Teh Lain Lee*[2] are in point. See also the case of *Richards* v *Cox*.[3]

In the event therefore I gave judgment for the plaintiff in his claim against the defendants with costs.

Application allowed.

Solicitors: *Chooi & Co*; *Shearn Delamore & Co*.

Reported by *Ng Sheau Jiuan*